



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 5.4(b), 7.2(a)-(c), and 7.3. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 94-4
July, 1994**

Topic: Referral for legal services, solicitation

Digest: A lawyer or law firm may participate in a seminar relating to Advance Directive Services in which a health care organization (HCO) assists in preparation of materials so long as any payment by the lawyer or firm to the HCO is limited to the costs of preparation of the materials, those materials and their distribution comply with the rules on advertising, and all legal services are rendered solely by the lawyer.

Ref.: Rules 5.4(b), 7.2(a) and (b), 7.3(a)
Opinions 84-1 and 90-19

FACTS

Law Firm A ("Firm A") proposes to create a relationship with a health care organization ("HCO") that offers and promotes various health care products and services, through health care providers under contract with HCO, to employers and their employees and dependents. Firm A is a general practice law firm comprised of lawyers duly licensed to practice law in Illinois.

Because the preparation of an advance directive is a legal service, as is the counseling of individuals on the specific design, legal meaning and implications of advance directives, the purpose of the proposed relationship is to establish Advanced Directive Services (ADS) dealing with design, marketing and execution of advanced directives consisting of a living will and a Durable Power of Attorney for Health Care. It is presumed that since HCO is in the health care field, that a Durable Power of Attorney for Property is not contemplated to be a part of the ADS. It is also acknowledged by the inquirer that the HCO's proposed involvement in this project is not in any way intended to directly involve HCO in the providing of legal services. In that regard, the key terms of the proposal are as follows:

(a) HCO would assist Firm A in the marketing of the ADS. Specifically, under the direction of Firm A, HCO would assist in the design, preparation and printing of ADS brochures clearly identifying Firm A, as between Firm A and HCO, as the sole provider of legal services. The brochures would generally describe the ADS and would include a tear-out application on which the prospective client would identify his/her specific needs and desires with respect to the terms of an advance directive;

(b) HCO would assist Firm A in the distribution of the ADS brochures to employee groups and other groups with which HCO has contacts;

(c) Either contemporaneous with or following the distribution of brochures to a group, HCO would assist Firm A in presenting a seminar to the group, informing individuals generally about advance directives. HCO's role would be to explain the general needs for advance directives; however, all legal issues would be addressed solely by Firm A.

(d) Firm A and HCO would assist individuals in completing the tear-out applications from ADS brochures. Any assistance from HCO would be only under the direction of and in consultation with Firm A;

(e) The completed tear-out applications would be collected by Firm A from interested individuals within the group immediately following the seminar or would be mailed by the individuals directly to Firm A. The applications would have to be accompanied by the standard fee for Firm A's legal services;

(f) Firm A would analyze the completed applications and prepare an appropriate advance directive for each individual; and

(g) A follow-up meeting with each group would be scheduled at which Firm A would separately meet with each individual, verify with him/her the terms of the advance directive, explain the implications of the advance directive, answer any questions and witness execution of the advance directive by the individual.

QUESTIONS

1) Would the ADS proposal constitute aiding HCO in the unauthorized practice of law?

- 2) Would using HCO as a marketing agent in the ADS proposal constitute forming a partnership with a non-lawyer?
- 3) Would the marketing of the ADS constitute improper solicitation of legal business?
- 4) Would any of the proposed methods of payment to HCO for its marketing services constitute the sharing of legal fees with a non-lawyer or otherwise be impermissible under the Rules of Professional Conduct?

OPINION

Health care providers under various state statutes and regulations are required to provide certain information regarding Advance Directives to patients. Thus, their participation in seminars and assisting patients with regard to health care Advance Directives is in furtherance of this public mandate. Thus, the function of the HCO may be distinguished from the circumstances relating to bankers assisting in estate planning as set forth in Opinion 84-1. HCO's role would be to explain the general needs for advance directives; however, in doing so, they must exercise extreme caution to insure that the explanations given are not in conflict as between the HCO and the client.

Rule 5.4(b) provides that:

A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consists of the practice of law.

The arrangement as outlined in the facts could be determined to be a partnership, particularly depending upon the handling of fees for services rendered by each party and if so, would be a violation of Rule 5.4(b).

So long as all legal services were performed by Firm A, HCO would not be engaged in the unauthorized practice of law and thus, Firm A would not be aiding in the unauthorized practice of law. (see Rule 5.5(b))

Rule 7.3 provides that:

Except as provided in this Rule 7.3 or as permitted by Rule 7.2, a lawyer shall not directly or through a representative solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain.

In the circumstances as presented, the contact with the prospective client is through the extension of providing health care services by HCO who then, through seminars, would refer the client to Firm A. The HCO, however, must not state or imply that Firm A is the only firm that can provide services regarding ADS. The facts are careful to provide that all legal services in the relationship with the clients will be rendered by the lawyer.

If the materials which are distributed to the clients reflect the name of Firm A, they would

constitute advertising and thus, Firm A must comply with Rules 7.2(a)(1) and (2) by maintaining a copy of the written communication for three years after its last dissemination along with a record of when and where it was used and the item must include the name of at least one lawyer responsible for its content.

Any fee charged by Firm A must be on the basis of services rendered by Firm A alone. Compensation to HCO must be independent of Firm A's fees. As set forth in Opinion 90-19 dealing with referrals by financial planners, a lawyer may not give anything of value to a referring party to initiate contact with a prospective client. Payment by Firm A to HCO for the referrals calculated on any basis as to the number of clients secured for the ADS would be a violation of Rule 7.2(b). Firm A may, however, pay to HCO the costs of preparation of the materials.

* * *